IN THE HIGH COURT OF HIMACHAL PRADESH, SHIMLA.

CWP No.: 708 of 2002 alongwith CWPs. No.709, 715, 1197, 1348 and 1554 of 2002.

Decided on: 21.05.2007.

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1. CWP No.708/2002

Besar Lal.

… … … Petitioner.

Versus

H.P.S.E.B. and others.

… … … Respondents.

For the petitioner: **Mr. Neel Kamal Sood, Advocate.**

For the Respondents: **Mr. Shrawan Dogra, Advocate for Respondents-Board.**
Mr. M.S. Chandel, Advocate General with Mr. M.A. Khan and Ms. Meenakshi Sharma, Deputy Advocate Generals for respondent(s)-State.

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2. CWP No.709/2002

Mool Raj.

… … … Petitioner.

Versus

H.P.S.E.B. and others.

… … … Respondents.

For the petitioner: **Mr. Neel Kamal Sood, Advocate.**

For the Respondents: **Mr. Shrawan Dogra, Advocate for Respondent(s)-Board.**
Mr. M.S. Chandel, Advocate General with Mr. M.A. Khan and Ms. Meenakshi Sharma, Deputy Advocate Generals for respondent(s)-State.

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3. CWP No.715/2002

Dharam Pal.

… … … Petitioner.

Versus

H.P.S.E.B. and others.

… … … Respondents.

For the petitioner: **Mr. Neel Kamal Sood, Advocate.**

For the Respondents: **Mr. Shrawan Dogra, Advocate for Respondent(s)-Board.**
Mr. M.S. Chandel, Advocate General with Mr. M.A. Khan and Ms. Meenakshi Sharma, Deputy Advocate Generals for respondent(s)-State.

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4. CWP No.1197/2002

Bhagat Ram.

… … … Petitioner.

Versus

State of H.P. and others.

… … … Respondents.

For the petitioner: **Mr. Neel Kamal Sood, Advocate.**

For the Respondents: **Mr. M.S. Chandel, Advocate General with Mr. M.A. Khan and Ms. Meenakshi Sharma, Deputy Advocate Generals for respondent(s)-State.**

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5. CWP No.1348/2002

Ranjhu Ram.

… … … Petitioner.

Versus

State of H.P. and others.

… … … Respondents.

For the petitioner: **Mr. R.D. Kaundal, Advocate.**

For the Respondents: **Mr. M.S. Chandel, Advocate General with Mr. M.A. Khan and Ms. Meenakshi Sharma, Deputy Advocate Generals for respondent(s)-State.**

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6. CWP No.1554/2002.

Het Ram.

… … … Petitioner.

Versus

H.P.S.E.B. and others.

… … … Respondents.

For the petitioner: **Mr. Neel Kamal Sood, Advocate.**

For the Respondents: **Mr. Shrawan Dogra, Advocate for Respondent(s)-Board.**
Mr. M.S. Chandel, Advocate General with Mr. M.A. Khan and Ms. Meenakshi Sharma, Deputy Advocate Generals for respondent(s)-State.

Coram:

The Hon'ble Mr. Justice Rajiv Sharma, J.

Whether approved for reporting?[1]

Rajiv Sharma, Judge (Oral):

Since the common question of law is involved in this bunch of petitions, the same are clubbed and heard together.

The sole question requiring consideration of this Court in these petitions is whether the action of the State of refusing to make the reference(s) is bad in law or not.

The State Government in these petitions has refused to make the reference on the sole ground that the petitioners-workmen had not completed 240 days preceding the date of their retrenchment. The impugned Annexures are:

Whether reporters of local papers may be allowed to see the judgment?

P-1, dated 1st April, 2002 in CWP No.708 of 2002,

P-1, dated 1st April, 2002 in CWP No.709 of 2002,

P-1, dated 1st April, 2002 in CWP No. 715 of 2002,

P-1, dated 1st April, 2002 in CWP No.1197 of 2002,

P-2, dated 26th February, 2002 in CWP No.1348 of 2002 and

P-1, dated 3rd August, 2002 in CWP No.1554 of 2002.

This Court is of the opinion that there existed an Industrial dispute between the employer and the workmen and it was incumbent upon the Government to make the references to the Labour Court. The Government had no jurisdiction or authority to delve into the merits of the case since the same is/are required to be adjudicated upon by the Labour Court. The plea whether the workmen had completed 240 days or not is to be adjudicated upon on the basis of the evidence led by the respective parties.

The Hon'ble Supreme Court in **The M.P. Irrigation Karamchari Sangh v. State of M.P. and another, AIR 1985 SC 860** has held that the Government had exceeded its jurisdiction in refusing to refer the dispute to Tribunal by making its own assessment unilaterally of the reasonableness of demands on merits. Your Lordships have held as under:-

> **"We have considered the rival contentions raised before us. The High Court apparently has relied upon the following passage in Bombay Union of Journalists v. State of Bombay AIR 1964 SC 1617 :**
>
> > **" …. But it would not be possible to accept the plea that the appropriate Government is precluded from considering**

> **even prima facie the merits of the dispute when it decides the question as to whether its power to make a reference should be exercised under Section 10(1) read with Section 12(5) or not. If the claim made is patently frivolous, or is clearly belated, the appropriate Government may refuse to make a reference. Likewise, if the impact of the claim on the general relations between the employer and the employees in the region is likely to be adverse, the appropriate Government may take that into account in deciding whether a reference should be made or not."**

We find that the approach made by the High Court was wrong and the reliance on the above passage on the facts of this case, is misplaced and unsupportable. This Court had made it clear in the same Judgment in the sentence preceding the passage quoted above that it was the province of the Industrial Tribunal to decide the disputed questions of fact.

> **" …. Similarly, on disputed questions of fact, the appropriate Government cannot purport to reach final conclusions, for that again would be the province of the Industrial Tribunal…… "**

Therefore, while conceding a very limited jurisdiction to the State Government to examine patent frivolousness of the demands, it is to be understood as a rule, that adjudication of demands made by workmen should be left to the Tribunal to decide. S. 10 permits appropriate

Government to determine whether dispute 'exists or is apprehended' and then refer it for adjudication on merits. The demarcated functions are (1) reference, (2) adjudication. When a reference is rejected on the specious plea that the Government cannot bear the additional burden, it constitutes adjudication and thereby usurpation of the power of a quasi judicial Tribunal by an administrative authority namely the Appropriate Government. In our opinion, the reasons given by the State Government to decline reference are beyond the powers of the Government under the relevant sections of the Industrial Disputes Act. What the State Government has done in this case is not a prima facie examination of the merits of the question involved. To say that granting of dearness allowance equal to that of the employees of the Central Government would cost additional financial burden on the Government is to make a unilateral decision without necessary evidence and without giving an opportunity to the workmen to rebut this conclusion. This virtually amounts to a final adjudication of the demand itself. The demand can never be characterized as either perverse or frivolous. The conclusion so arrived at robs the employees of an opportunity to place evidence before the Tribunal and to substantiate the reasonableness of the demand.

Same is the case with the conclusion arrived at by the High Court accepting the stand of the State Government that the employees were not entitled to the Chambal allowance as the same was included in the consolidated pay. This question, in fact, relates to the conditions of

service of the employees. What exactly are the conditions of service of the employees and in what manner their conditions of service could be improved are matters which are the special preserve of the appropriate Tribunals to be decided in adjudicatory processes and are not ones to be decided by the Government on a prima facie examination of the demand. This demand again can never be said to be either perverse or frivolous.

There may be exceptional cases in which the State Government may, on a proper examination of the demand, come to a conclusion that the demands are either perverse or frivolous and do not merit a reference. Government should not be very slow to attempt an examination of the demand with a view to decline reference and Courts will always be vigilant whenever the Government attempts to usurp the powers of the Tribunal for adjudication of valid disputes. To allow the Government to do so would be to render S.10 and S. 12(5) of the Industrial Disputes Act nugatory.

We have no hesitation to hold that in this case, the Government had exceeded its jurisdiction in refusing to refer the dispute to the Tribunal by making its own assessment unilaterally of the reasonableness of the demands on merits. The High Court erred in accepting the plea of the Government that refusal to refer the demands in this case was justified. The demands raised in this case have necessarily to be decided by the appropriate Tribunal on merits."

Similarly, the Hon'ble Supreme Court in **Dhanbad Colliery Karamchari Sangh Versus Union of India and Others, 1991 Supp (2) SCC 10** has held that the Government cannot itself decide the dispute on the ground that Union failed to establish that workmen were engaged in prohibited categories under Contract Labour (Regulation and Abolition) Act, 1970. Their Lordships of Supreme Court have held as under:-

> **"After hearing learned counsel for the parties and having regard to the facts and circumstances of the case, we are of the opinion that this appeal must succeed. The Central Government instead of referring the dispute for adjudication to the appropriate Industrial Court under Section 10 of the Industrial Disputes Act, 1947, itself decided the dispute which is not permissible under the law. We, accordingly, allow the appeal, set aside the order of the High Court and of the Central Government and direct the Central Government to refer the dispute for adjudication to the appropriate Industrial Court under Section 10 of the Industrial Disputes Act, 1947. We further direct the Central Government to make the reference within three months."**

The Hon'ble Supreme Court in **Telco Convoy Drivers Mazdoor Sangh and another, v. State of Bihar and others, AIR 1989 SC 1565** has held that the Government while considering the question whether reference should be made or not cannot delve into merits of dispute and determine the lis itself. Their Lordships of Supreme Court have observed as under:

"Applying the principle laid down by this Court in the above decisions, there can be no doubt that the Government was not justified in deciding the dispute. Where, as in the instant case, the dispute is whether the persons raising the dispute are workmen or not, the same cannot be decided by the Government in exercise of its administrative function under Section 10(1) of the Act. As has been held in M.P. Irrigation Karamchari Sangh's case (supra), there may be exceptional cases in which the State Government may, on a proper examination of the demand, come to a conclusion that the demands are either perverse or frivolous and do not merit a reference. Further, the Government should be very slow to attempt an examination of the demand with a view to declining reference and Courts will always be vigilant whenever the Government attempts to usurp the powers of the Tribunal for adjudication of the valid disputes, and that to allow the Government to do so would be to render Section 10 and Section 12(5) of the Act nugatory."

Similarly, the Hon'ble Supreme Court in a case between **Abad Dairy Dudh Vitran Kendra Sanchalak Mandal and Abad Dairy and others, 1990 (6) F.L.R. 282** has held as under:-

"We have heard counsel for the appellant as well as counsel for the respondents. We are of the opinion that having regard to the facts of the case as well as the voluminous evidence sought to be adduced by both sides, the question as to whether the members of the association are workmen or not requires detailed investigation of facts. It is true that there appeared to be certain agreements

entered into between the respondents and the appellants but it is the case of the appellants that, agreement apart, there is plenty of evidence in the form of instructions and circulars issued by the respondents which would show that the members of the association were really workmen and not commission agents as alleged. In fact, in pursuance of the permission given by this Court to file affidavits the parties have filed affidavits running to several pages setting out facts in support of their respective contentions. We have also heard both counsel for sometime and are satisfied that the issue requires detailed examination of facts and can be satisfactorily adjudicated upon only by a Tribunal.

We are of opinion that neither a writ proceeding in the High Court nor an appeal under Article 136 is the proper forum in which these factual contentions and allegations should be gone into. The High Court itself has observed at various places in its judgment that the nature of the dispute between the parties and the facts and circumstances were such that a writ petition was not the appropriate forum to enter into such facts but seems to have allowed itself to be persuaded to go into the question perhaps because the counsel on both sides were not adverse to that course. We however think that the High Court should not have done this but, instead, should have directed the Government to refer the disputes between the parties to an Industrial Tribunal, making the issue of the jurisdictional fact, viz., as to "whether the appellants workmen?" also one of the terms of reference. We say this

because, though there are agreements between the parties, not only is the interpretation of the agreement a matter of dispute; it will also be necessary to consider whether the agreement reflects the real position or whether the conduct of the parties and other material placed on record show that the appellants were employees as suggested by the appellants and not commission agents as suggested on behalf of the respondents. Also, the only ground on which the State Government declined to make a reference was that the appellants were not workmen. This view is not so obvious or patent on the facts before us. In the circumstances, we think the best course is to set aside the order of the High Court and direct that the matter be gone into by an Industrial Tribunal after the Government has made an appropriate order. we, therefore, allow these appeals, set aside the order of the High Court and direct the State Government to refer to an Industrial Tribunal all the disputes between the parties including the preliminary question whether the appellants are workmen within the meaning of Industrial Disputes Act or not.

The State Government is directed to make the above reference within a period of two months from today. In the meantime, in the interests of justice, status quo should be maintained by both the parties, as already directed by this Court on December 13, 1988. This shall continue for a period of ten weeks from today. This will not, however, preclude the respondents from taking such action against individual members of the appellants for misconduct, breach of the

agreement or the like as may be open to them in law, in case any occasion should arise therefore. We wish to make it clear that in view of our above conclusion, we express no opinion on the findings contained in the judgment of the High Court on the evidence before it as to whether the appellants are workmen or not and leave the matter to be decided afresh by the Tribunal on the evidence led before it, unfettered by the findings of the High Court in this behalf."

Similarly, the Division Bench of Hon'ble Rajasthan High Court in **Bhika Ram Vesus State of Rajasthan & Ors., 2001 (7) SLR 84** has held that the decision whether the workman had competed 240 days or not has to be adjudicated upon by the Labour Court and not the State. Their Lordships have observed as under:-

"The appellant workman was appointed on muster-roll basis as a workman in the Public Works Department, Sirohi Division on 1.10.87. In the month of July, 91, his services were terminated by an oral retrenchment order. He, therefore, moved the Conciliation Officer and Labour Welfare Officer, Sirohi- respondent No.5 raising industrial dispute about his illegal retrenchment from service on the ground that he has competed 240 working days in a calendar year with the respondent department. However, the respondent No.1 refused to refer the dispute to the Labour Court for its decision on the ground that the workman had not completed 240 working days in one calendar year, by his impugned order dated 16.4.93 (Ann. 2 to the writ petition). Aggrieved of

that order, the appellant filed the writ petition No.2513/93 before this Court with a prayer to quash and set- aside the oral retrenchment order passed in July, 1991. The learned Single Judge after hearing both the learned counsel for the parties dismissed the writ petition by holding that the workman failed to prove that he had completed 240 working days in a calendar year, therefore, there was no violation of Section 25-F of industrial Disputes Act (for short 'the Act'). The learned Single Judge further held that the State Government had not committed any error in refusing to make the reference to the Labour Court for the correct adjudication of the dispute by the impugned order dated 16.4.93.

In the case of Dhanbad Colliery Karamchari Sangh vs. Union of India and Ors. Reported in 1991 Supp (2) S.C.C. page 10, the Hon'ble Supreme Court has clearly held that the Government cannot itself decide the dispute. The said judgment in Dhanbad's case (supra) is clearly binding on us."

The Division Bench of the Hon'ble Punjab and Haryana High Court has held in **Sanjay Kumar Versus Union of India and others, 2003 (5) SLR 762** that while exercising the powers under Section 10(1) of the Industrial Disputes Act function of appropriate Government is an administrative function and not a judicial or quasi-judicial function and while performing the administrative function Government cannot delve into the merits or the dispute and take upon itself the determination of the lis.

The upshot of the above discussion and the law discussed above is that the State has exceeded the jurisdiction vested in it by Section 10 of the Act. Accordingly, these petitions are allowed and the impugned Annexures P-1, dated 1st April, 2002 in CWP No.708 of 2002, P-1, dated 1st April, 2002 in CWP No.709 of 2002, P-1, dated 1st April, 2002 in CWP No. 715 of 2002, P-1, dated 1st April, 2002 in CWP No.1197 of 2002, P-2, dated 26th February, 2002 in CWP No.1348 of 2002 and P-1, dated 3rd August, 2002 in CWP No.1554 of 2002 are quashed and set aside.

The respondents-State is directed to make a reference to the Labour Court-cum-Industrial Tribunal within a period of two months from the date of receipt of the certified copy of the judgment.

There shall be no order as to costs.

May 21, 2007 **(Rajiv Sharma)**
(sck). **Judge**